UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

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| UNITED STATES OF AMERICA | ) | DOCKET NO. 3:22-CR-157 |
| | ) | |
| vs. | ) | VOLUME III - REDACTED |
| | ) | |
| DAVID TATUM, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE KENNETH D. BELL
UNITED STATES DISTRICT COURT JUDGE
MAY 4, 2023

APPEARANCES:

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P R O C E E D I N G S

THURSDAY MORNING, MAY 4, 2023

(Court called to order at 8:57 AM.)

THE COURT: Good morning.

ALL COUNSEL: Good morning.

THE COURT: Juror number 11 was in a minor vehicle accident this morning. She's fine, but she's shaken up and she's not going to be here. So we've got our 12, thank goodness.

Are we ready for the jury?

MR. CERVANTES: Yes, Your Honor.

(Jury entered the courtroom.)

THE COURT: Good morning, members of the jury.

Juror number 11 was in a minor car accident this morning and she's fine, but she's shaken up a little bit and is not going to be joining us. So we have the 12 we need to proceed.

I expect that you'll begin your deliberations not later than 11:30 and I don't intend to take a break between now and then; but if anybody needs one, please let me know.

As I told you yesterday, what we'll have this morning are closing arguments of the attorneys and then the final instructions from the Court. Of course, I remind you that the arguments of the attorneys are not evidence and that the law, of course, comes from the Court. For instance,

questions about the legality of the seizure of certain evidence or the admissibility of evidence under the rules of evidence are for the Court to decide. The Court has decided those issues and they're not for your consideration.

Now, the arguments will begin with the government's opening argument and then the defense will present its argument. And then because the government has the burden of proof, it is allowed a rebuttal argument after the defense argument.

The jury is with the government.

MR. ODULIO: May it please the Court, Dr. Tatum, counsel, ladies and gentlemen of the jury:

This is the defendant setting up this phone to use his 15-year-old cousin to produce and make child pornography as she got undressed, used the toilet, and took a shower in her family vacation home in Maine. He saved that child pornography from this phone. After he deleted it from this phone, he saved it on to that hard drive and transported it here to North Carolina. He possessed it and other child pornography like it on that hard drive and used that MacBook to access it and to view it. He's guilty of all the counts in the indictment alone for this conduct.

Count two charges production of that child pornography video of M.C.. She came in here yesterday and testified in front of you that she was 15 years old at the

time this was taken. She identified the defendant in that image of him gazing into this phone. Setting it up to capture her pubic region, her vagina, strategically on that floor. Flushing the toilet after he left. That's count two.

Count three is when he saved it onto that hard drive and transported it into the Western District of North Carolina.

And of course, you see there in count one the possession and access with intent to view.

And the forensic examination of that MacBook and all of these devices show that he did it. He saved it for over seven years along with his other child pornography. And what does that tell you? Was this an accident? Was this a big mix up? Was this planted by somebody else? Of course not. This evidence that we've shown you proves that the defendant did it. That this was no accident or mistake. It was deliberate. It was intentional. It was well planned with multiple steps.

And this picture of the defendant gazing into this phone along with all the other evidence we presented proves that he committed the three types of crimes charged in the indictment. And the M.C. video alone, that first bathroom video alone, is sufficient to convict him of all these counts. Let me say that again. The video of M.C. that he produced is sufficient to convict him of possession and access with intent to view, production and attempted production as charged in

count two, and transportation of child pornography.

And make no mistake, ladies and gentlemen, one video is enough. One still from one video of child pornography is enough. You're not going to hear anything in the jury instructions that say that there's got to be a quantity of child pornography to convict. One is enough. And when it comes to child pornography, one image is too many.

But we've given you much more evidence than the single video that he produced in Maine. We've shown you pictures and other videos of child pornography. We've shown you forensics. We've even shown you and played for you the defendant's own statements he gave to the FBI when asked about these images. And all of those lead to the conclusion, the only conclusion, that he's guilty.

Now, I'm going to take you through that evidence, show you some of the elements, highlight some of the things for you to consider. But before we do that, let's knock out some low hanging fruit, get it out of the way so you can focus on other matters.

The first thing is this issue of child pornography that you've heard about. The Court is going to instruct you and give you some instructions and I'm going to highlight some of those briefly for you.

Child pornography involves the use of a minor engaging in sexually explicit conduct.

It also involves images that have been created, adapted, or modified to appear that an identifiable minor, that is, it means that you can tell it's a kid, is engaging in sexually explicit conduct.

Now, we've shown you both types during this trial. Mr. Cervantes in his opening highlighted that for you, right?

The second category or bucket that we showed you, those are the adapted, modified, you've heard it referred to as morphed images. Okay. If they're sexually explicit, if those adapted images are sexually explicit, they meet the definition. And they were, right?

All of the other images fall into that first category involving a minor engaging in sexually explicit conduct.

And look, there's a couple of other related concepts here and I'm going to go through them, but it's not complicated. It either is or isn't child pornography, okay. It's kind of like being pregnant. You can't be half pregnant. It can't be half child pornography. And there is no ambiguity with these images that we had to display for you. And that was not for the faint of heart, right? It's our duty to display those to you. It's your duty to look at them. And we did it because when you go back into that room, you've got to make that determination. But in this case it's not even a close call.

So that first category we'll talk about in a second. There is a little bit of a nuance on that second category, right? If it's adapted or modified. You'll hear the Court tell you that as long as the face of the person depicted in that image is a child, it's not relevant whether the adapted or modified body that was put on that child is that of a minor or an adult. Set that aside. The issue of concern is whether or not it's sexually explicit, okay.

And what is sexually explicit? Well, you don't need to be any kind of learned person to know what that is, right? It's sexual intercourse between a person of the same or opposite sex. It is masturbation. It is a lascivious exhibition of the pubic area, genitalia. And all of the images and the images that you have seen have fallen into some or all of those categories.

Recall the first video we had to play for you of those two girls on that bed having sex. That's sexually explicit conduct. Recall the other images from the HP. Of those two videos, those were over 50 minutes long, we played 10 seconds for you. Sufficient to establish what those were. And they were child pornography, right?

What's lascivious exhibition? Well, you're going to hear from the Court it's when the image, the focal point of the image is on the genitals or the pubic area; whether the setting of the image makes it sexually suggestive; whether the

child is fully or partially nude; and whether the visual depiction is intended to elicit a sexual response from the viewer. And that's important. That's very important.

But again, those videos that I mentioned, we also have the M.C. video, right? Is she fully nude? Yes, of course she is, right? We've got the prom picture. A prom picture. Who does that? A first day of school picture of 10-, 11-, 12-, 13-year-olds posted on Facebook adapted into child pornography. Who does that? They were fully nude, right?

What else? Look at the setting, look at the focal point. They all meet the definition.

And what else can you take from this? Well, they were designed to elicit or intended to elicit a sexual response. How do we know? FBI asked him about it, right? And what did he say? What did he use the images for? Those are his words. You heard them. We played them for you. He was clear. There's no ambiguity about it. They asked him again, right? What did he say? Answered the question already, right? What does that -- how and to what extent does that inform you with respect to these images? It shows and demonstrates, ladies and gentlemen, that this is child pornography. There's no ambiguity. There's no argument here.

And again, one is enough. One still is enough to convict him. It ain't complicated. Common sense, good

judgment, and life experience. That's why you're here. And that's what you're going to use in there to get through this issue.

Okay. What else? Interstate commerce. You heard Mr. Cervantes ask forensic examiner Whitt these questions about where this stuff was manufactured. That's because, as I'm going to go through with you with respect to each of the counts, the law requires that some -- in some manner these devices had to be manufactured outside of North Carolina or the United States or had to move in interstate commerce, right?

So in any permutation of what you're going to hear, this child pornography was made with an item made outside of the United States, right? It was saved on an item made and manufactured outside of the United States. It was transported from Maine to North Carolina on that item which is manufactured outside of the United States. And it was, of course, actually transported across state lines. So interstate commerce, as you're going to hear, nothing burger. We met it. Check it off the box. All of the interstate commerce elements are going to be met and have been met.

Okay. That's child pornography. That's interstate commerce. What else? Let's look at each of the counts.

Count one charges possession and access with intent to view, right? And here are the elements that the Court will

instruct you on. And you'll have these instructions in the back.

The first is the defendant knowingly possessed, or accessed with intent to view, the child pornography.

That the material had been mailed or shipped in interstate or foreign commerce. That's the interstate commerce element I talked about.

And then the last is when he possessed it, the defendant knew the material contained child pornography.

All right. Let's break that down.

Was it child pornography? Is that even a legit question? Of course it is. In all of its horror it is.

Okay. The interstate commerce element is satisfied.

So how did we prove knowing possession? Well, let's look at the devices. Two of these were taken right from him by the FBI, right? And I'll go through each of the devices in this presentation, but what did they contain? They contained pictures of him. They contained a picture of him, a video of him producing child pornography, right? Two of those devices came from his wife who he lived with at the time. The HP, right, came from this home in Mint Hill. Where did it come from? A home office, right? Nice office.

What else was in that office? Medication. Whose name was on it? The defendant's. Is there any ambiguity about whose devices these were? No, of course not.

When you consider the flash drive, what was on the flash drive? Images of minors he knew, prom date pictures, pictures that he got off Facebook, right? What does that tell you about the knowing possession?

And during the interview with the FBI, the defendant himself foreshadowed this idea of forensics, right? The idea that a forensic analysis of these devices are going to find evidence, traces of what he did with them, right?

And Jason Whitt was on the stand a lot and it had to do with forensic evidence, which is the kind of evidence that the judge already talked about on the first day: circumstantial evidence or indirect evidence. Do you remember that? Remember the analogy Judge Bell used? If you go to bed at night and your driveway is dry and in the morning you wake up and it's wet, it probably rained, right? And he said the law makes no distinction between direct and indirect evidence. You can make your observation and develop an inference that of course it rained.

But during this trial we got some suggestions, right? Hey, it rained in the driveway -- it rained overnight. My driveway is wet. It must have rained overnight. Oh, no, no, no, your sprinkler must have been on. Well, my neighbor's driveway is wet. Oh, your sprinkler must have sprayed on him. Well, my across-the-street neighbor's driveway is wet. He doesn't have a sprinkler system. Well, the town well must

have leaked on it, right? If no one saw the storm, it couldn't have been. Well, that's just not true. And you know that from life experience and common sense. The law makes no distinction. The forensic evidence showed you what? It showed you the picture of his face right there that you see on the screen. It showed you what was saved on what devices and what was plugged in and accessed. And it was foreshadowed by the defendant's own statement.

So don't get bamboozled by that. Indirect evidence which we've offered you which has been corroborated through other evidence demonstrates that he possessed these devices knowingly.

How did we do that? We showed you the 1,118 file names of pthc. One thousand one hundred and eighteen. And I'm not going to read the names to you because you can see them. And they're disgusting. They're abhorrent. And the other take away is these file names reference specifically 6-year-olds, 10-year-olds, 7-year-olds. And there was a lot of questions during the trial, hey, pthc could represent adults, right? I guess. What do these files say? Six-year-old, 7-year-old, 4-year-old.

Focus on the evidence in front of you, not on hypotheticals or what ifs or could haves or might coulds, right? This is what is in front of you in this trial and it shows that these terms, which were accessed with that MacBook,

were oriented towards children, child pornography.

We showed you the PLIST. Very similar evidence, right? Recently accessed videos, recently played videos on the VLC. Jason Whitt explained that to us so that a lay person could understand. What is the take-away? That MacBook which was in his possession had evidence that those videos were played. No one saw him do it. Use your good judgment and common sense when evaluating that argument, okay? I know you will.

These are his devices. I'm going to talk about attribution but before I do that, recall that the My Passport on the top left was encrypted. It had to be sent to Quantico. Consider that fact when evaluating the evidence. No one in Charlotte was able to give the FBI that password. It had to be sent off. And what did the evidence show with respect to that hard drive? It was plugged in and accessed to what? That MacBook. Who had the MacBook? The defendant. More than that. The user path, the folder path. I saw you paying attention. The take-away there is what is a user path? Who is the user path?

Two things. Number one, it matched the file path on the hard drive where the child pornography was kept. And the second thing, the user path was this fella. This fella, David Tatum, Morphus.

Did it rain? Did anybody see it? Come on. Come

on.

Attribution. We presented evidence of attribution on each of these devices. Again, you recall Agent Whitt's testimony. He starts with a search for the child pornography and he follows that evidence. And when he followed the evidence, he found that it was in the user profiles and folders associated with the defendant and he found these other documents in these devices. And what do these documents show? We showed you. It's in evidence. Mostly unchallenged. What are these? His driver's license, his certificate of completion for his fellowship in child psychiatry -- child psychiatry -- tax returns, photos of ex-girlfriends, interview schedule for his job here in Charlotte, and, importantly, a resume.

What's highlighted there? A phone number. Why is that highlighted? What is that phone number tied back to? This thing. What is this? This is his phone. The user ID on the phone says David's iPhone. The resume has this phone number on it.

Did it rain? I think there might could have been a hurricane after this trial.

So the conclusion is, of course, the only conclusion, he knowingly possessed child pornography.

All right. And we know that again because, look, when they asked him about this stuff, this is what he said

that he used it for. Recall the topic of the conversations when this interview happened. Those adapted or modified images, which included -- one of those images was an image that he downloaded from Teen Gallery of a clothed girl at a pool holding a phone and it was adapted to display and make the focal point her vagina in a lascivious manner. That meets the definition. It's child pornography. So keep that in mind as you evaluate that admission.

Okay. Count two, production. These are the elements of production. And I started my talk with this because, quite frankly, again, the video of M.C. totally establishes -- that first bathroom video, as the Court will instruct, establishes that.

Was the defendant -- was the minor under the age of 18? Of course she was.

The defendant used or employed or persuaded or induced the minor. Used is what's in play here.

And again, whether or not the visual depiction was mailed or actually transported, we've proven it was actually transported in and affecting interstate commerce.

So what is used? What is used? We know the defendant used M.C. to make child pornography. She wasn't aware that she was being used. And that doesn't matter. According to the instructions you're going to receive from Judge Bell, it's really a non-issue. Think about it this way.

You can use a shovel to dig a hole. The shovel isn't aware that it's being used to dig a hole but that hole exists. Same concept. He used his cousin to make child pornography.

It was actually transported in interstate commerce. It was produced using materials that affected interstate commerce.

There's also a nuance to this count, ladies and gentlemen, a distinction I ask you to keep in mind. This is also charged as an attempt. And what that means is you can convict the defendant if you determine that the defendant intended to commit this crime of producing it and he took a substantial step toward the commission of that crime. And what that means is you wouldn't even have to reach or resolve the question of whether that image, that video met the definition of child pornography if you concluded that he intended, intended to use M.C. to produce that video and he took a substantial step. I'm not suggesting it doesn't meet the definition. Of course it does. I'm pointing out a nuance you're going to hear about from Judge Bell. There's two paths to liability there. Either one he's guilty.

And what he did with M.C. wasn't an accident. He made other surreptitious videos too using the same phone, saving it in the same location on the hard drive, and accessing it to view it in the same way using that MacBook. We showed you that. And that evidence came in to demonstrate

to you that as charged in count two, he had the intent to produce the video involving M.C.. And how can we discern that? How can you fathom what's in a person's mind? Well, you look at what else he does. And that's why this evidence is relevant and that's why it was shown to you.

You recall, importantly, Jason Whitt established that those files involving those other videos and the M.C. video too were missing from this phone in the DCM folder, right? Sequentially all the files were there, all the other files were there except the child pornography files. What does that tell you? Was this an accident? Did he delete those out of the goodness of his heart? No, of course not. It was not an accident.

One of the hardest things we showed you was that patient video of F.L., the young lady who came in here, identified herself in the video and identified the defendant's voice. A patient, right? Someone who was purportedly being treated and given care by the defendant. What is he doing? What is he doing with his phone? What does that show you with respect to his intent? Where was it pointed? In her pubic region. What does that show you about his intent? Was it an accident? Was it a mistake or was it deliberate? Was it well-intentioned? Was it planned? If it was an accident, why was it saved on that hard drive for all these years? If it was an accident, why was it methodically deleted from his

phone? It wasn't an accident, right? And you can take that evidence in deciding with respect to count two if he had the intent to do it with M.C..

We showed you again these forensics. It reflects that where that file was saved was plugged into that computer. Simple as that. It's not anything more complicated. It rained. It rained. That's what we showed you. 9/10/2021, last accessed date on that folder.

And here's what's even more telling. The agents, you heard in the interview, asked him I think on two occasions, "Did you ever do anything with your patients? You're a child psychiatrist." What did he say? "No, never did anything. Search my office. Never did anything." That was a lie, right? And you can consider that again when determining whether this was a big mix-up. If it was a big mix-up, why lie? He lied.

What else? The video -- the second bathroom video of K.C.. We had Ms. E.S. come in here and identify her cousin, right? It was the family cabin in Maine. You recall the EXIF data. Again, why was this presented? Because it's the same modus operandi. Same camera angle designed to what? Capture the pubic region of the person taking a shower, right? Saved in what? The same place. Deleted in the same way. Consider that when determining whether the evidence and the burden has been met with count two. It has. And these other

videos show it. Again, the same access date. And, of course, the M.C. video as well.

So you recall as well the testimony from E.S. who testified about a conversation she had with the defendant 20 years ago when she confronted him about a video that he made of her when she was a minor, 15, and of his own sister, right? His own sister L.T. who was a year and a half younger than E.S.. That makes her a minor too in that video. And what did he do? Did he deny it? No. He admitted it. He admitted it. He even showed her how he did it in the crawl space in Grandma's attic. Moved the vent, right? That's evidence probative, relevant that you can use to discern whether that intent element of count two, whether we've met our burden. We have.

And again, we end the segment with the defendant's own words. These agents asked him, "What are you into?" And he says, "I'm a voyeur." What does that mean? People being videotaped without their knowledge, right? That's what this is. That's what count two is. That's what this other evidence is. And it's corroborated by the defendant's own statement, right?

He's guilty of count two on either theory, production or attempt. Convict him. Convict him. He's guilty.

Finally, the elements of count three,

transportation, quite frankly, is the easiest one.

The first is whether the defendant knowingly transported child pornography in interstate commerce. All right. We already did child pornography. We already did interstate commerce, right?

Did he do it knowingly? All the evidence relating to counts one and two establish that knowledge. They all do.

Again, the EXIF data shows these videos were produced in Maine. The forensic data, frankly your common sense, demonstrates that this was transported to North Carolina on that device. Accessed with intent to view on that MacBook. He's guilty of that. We've proven it. Convict him.

Now, as I demonstrated, all these elements are met and in just a few minutes it's going to be up to you. You're going to go back there and consider all the evidence. Some of the evidence that I'm going to ask you to consider are the defendant's own words. We played it for you at the start of this trial. His own words that he gave to the FBI.

He said, "I've searched for teens. I've used Teen Gallery. I went to a DeepFake website to adapt and modify these pictures. I got off on it."

"What does that mean? Did you masturbate to it?"

"Yes."

He admitted he's into voyeuristic videos, right? Which he explained as, quote, "people being videotaped without

their knowledge." He even said he deleted child pornography and kind of foretold this issue with the forensics. You can take that into consideration. It's powerful. His own words are powerful because, as some people say, words matter. And we've proven that here, right?

We've shown you a lot of forensics and that's important too because it's circumstantial evidence of rain. We've shown that. We've shown a hurricane to show you the defendant's guilt. And the Court's going to again, has instructed, direct is equal to circumstantial evidence. There is no distinction under the law.

And importantly, right, what did we end the trial with, the government's case in chief? We presented you those victims. They took that stand. You heard from them. They told their story.

And remember the testimony of E.S. most of all, his cousin. She identified K.C. in that video, right? Told us that she confronted him about the video that he made of her and his own sister. He admitted to it. He even showed her how, right? Do you remember the other aspect of her testimony? She said, hey, the defendant promised me, promised me, I'm never going to do it again, right? But we know that was a lie. We proved it. Because he did it again and again and again and again using these devices. He won't listen to his own cousin.

Think about the oath he took when he was a doctor and what he did using this phone, right? Wouldn't listen to his cousin, wouldn't listen to his oath. But guess what. He's got to listen to you, right? He's got to listen to your verdict. He's got to.

So when you go back into that room, with your verdict, with your verdict you can put an end to the defendant's sexual exploitation of children once and for all. Okay. He's guilty. We proved it. Convict him.

THE COURT: Mr. Ames.

MR. AMES: Thank you, Your Honor.

All right. Good morning, everybody. Once again, I wanted to say appreciate your time, appreciate your attention. I know how difficult these types of cases are. So I really thank you for your service.

We talked the other day when we first came out here on Tuesday. You recall I told you a few things during the opening argument. I told you we were not going to hide the ball on anything with regard to Mr. Tatum's prior conduct with other people. I said to you that he's an admitted porn addict, admitted sex addict. Has sought counseling for it. I told you that the government's case is going to include a lot of evidence not just of what they're alleging in their charges, but it was going to include a bunch of other evidence as well. And that their general gist of the information you

will receive would be that David Tatum is a pervert.

And we're not denying that he had prior acts that were bad. We're not denying that there aren't victims. There are. And there are a few of them sitting over there right now.

David Tatum betrayed his family. David Tatum betrayed the people that he trusted and who love him very much and I'm sure he loves very much as well. But he did terrible things to them.

But that is not what you're weighing today. What you're weighing today is whether or not the government has proven beyond a reasonable doubt that he committed the acts specifically that they are alleging. That's your role and that's your job. It is not to take an assessment of his entire life and his entire history and punish him for everything you've heard. Your specific job is to weigh the evidence for its relevant purposes and determine whether the government has specifically met the burden for the charges alleged.

I'm going old school with paper here. I'm going to run through that because I think there are a few points that we need to address here. Now, the U.S. attorney went over a few of these. I just want to quickly, while they're fresh here in everyone's mind, go over them real quick.

The child pornography definition. This is one that

you are going to have instructions on when you go in the back and the judge will give you these instructions in detail. But what it entails is production of a visual depiction of a minor. That part is pretty straightforward. Some of the rest of it isn't. There's an additional definition number two that you probably don't have to worry about, but this is specifically the instruction you're going to get later.

Now, keep in mind this is extremely important because unlike what many people may think, a nude image of a minor is not by itself child pornography. It just isn't. That's why you don't -- when you go home today, you're not going to have to throw out the pictures of your kid taking a bubble bath or running through sprinklers. There can be art, there can be pictures and photographs, a variety of those involving nudity of minors. It is not pornography by definition.

The law states and gives you the definition, and these are the categories. There's a few extra ones that were not just displayed so I'll give you all of them. They need to fit one of these five categories: sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, and then finally, lascivious exhibition of anus, genitals, pubic area of a person.

So you can pretty much eliminate one through four as a general matter in the information and images that you have

seen.

The lascivious exhibition of anus, genitals, pubic area is the definition that by and large we're dealing with here. But keep in mind the context of these other things that you're looking at.

The requirement for something to be child pornography is not just some nudity. It's much more than that. It requires sexually exploitive -- sexually explicit, rather, conduct. And it's not enough that they're not just nude. It's not enough that the pubic region is visible. That's not even enough under the statutory definition. It requires the lascivious exhibition specifically. And not just exhibition, lascivious.

Now, what does that word mean? Well, Congress being Congress, they didn't give us a definition. There's none in the statute. But it is a fact for you to decide. And the judge is going to give you some guidance. I'm going to show you those factors -- some of them anyway.

You're going to have this list back there, but essentially -- there's actually a total of six of these factors. They're not exhaustive nor all inclusive. They are not dispositive. They are for your consideration, okay? So you don't have to -- there's no checking of a box on each. There's no if I don't have one, then it's not or -- you just have to look at these as -- taking these in advisement in

helping you determine when you're looking at or thinking about a particular image, whether or not it constitutes lascivious exhibition.

But in particular, what's the exhibition part? It means a depiction that displays or brings to view to attract notice to the genitals or pubic area of children to excite lustfulness or sexual stimulation of the viewer. Again, it's not just someone standing there. It requires specific focus, exhibition. And not just exhibition, lascivious exhibition.

And those factors can include the focal point. Was it the focal point, the main focus of the image?

Was the setting made to appear sexually suggestive? Was there something within the image itself other than potentially just the focal point, but was it -- where was it? What was going on? Those can be factors.

Whether the person is displayed in an unnatural, inappropriate attire, inappropriate pose.

Whether they were fully clothed or nude.

And the final two:

Whether the depiction suggests coyness or willingness to engage in sexual activity.

And whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

And as the judge will note below, it doesn't have to involve all of them to be lascivious. It's for you to decide

the weight.

And again, just because genitals, anus, anything is visible is not enough. It has more to it. It requires more.

I just want to lay that all out so that -- my sincere hope is this is not a circumstance where you go and check a box and take things for granted. This is important. You have facts and things to weigh. You're the fact finders here. You're the ones that make these decisions and it's important that you do so carefully and with consideration.

I want to address a few of the main points, but one thing I want to make clear. There are three different types of counts in this case. They're similar in a lot of ways, but they also have some distinct differences. Count one is possession, which is possessing it. Count two is the production, which means making or producing. And count three is the transport. And the judge will lay those out as well and the differences and distinctions, but throughout them the definition of child pornography is going to be the same. The definitions and the factors you consider will be the same. So that analysis is going to carry out throughout this. But some of the other factors you're going to have to consider will be slightly different.

What I want to note to you is that of all the evidence, of every single piece of evidence that the government has presented to you, I want to be clear, only one

of them, and one only, even can meet the definition of count two which is the production count. The only video or image that meets that requirement is the video of his cousin M.C. taken with a camera in the bathroom getting in and out of a shower. That is the only one. It is not production to morph an image. That is not alleged. That one video is the only count that qualifies for count two.

So speaking on that video, what we observed and what the evidence provided was that this was at a cabin that the family goes to in Maine on a routine basis. Cousin E.S. said that she's gone, like, 20 times, I believe. Or many years. Thirty, I don't know. Very many times.

So in this bathroom you saw a video of what appeared to be David Tatum setting up a phone on a shelf somewhere in a bathroom. He leaves the room. Sometime later his cousin does come in, takes a shower and leaves. And he comes back in to retrieve the camera.

So what the government is arguing and what they want you to glean from that is that that was meeting all of the elements, not just for count two, but for the rest, but specifically for the second count for production, that this was meeting this definition that it was child pornography, number one. And number two, that it was done with intent to film her. And number three, that it was, in fact, saved, transported later for the other counts.

So the analysis specifically, was it child pornography? Again, no one here is contending it's not -- it's good. And frankly, I'm not contending it's noncriminal. There are other laws that David Tatum has assuredly broken, state laws, federal laws in other jurisdictions and elsewhere with the conduct that you have seen. But that is not for you to decide. You have three charges to decide and three only.

So whether or not he committed a crime in Maine in some fashion under their laws, or in New York under their laws, or even in North Carolina under the state laws here, that's not for your consideration. Whether or not he violated a voyeurism statute, whether or not he violated someone's privacy and that has a criminal implication. You have literally three charges to consider.

Here you would have to, in order to find him guilty, determine that this was in fact child pornography. Meaning it meets those definitions that we just talked about. That it's either bestiality or intercourse or sadomasochistic or exhibition of the pubic or genital region that is lascivious, meaning sparking desire or whatnot in the viewer. That's the only definition that would even come close to qualifying because there's clearly no intercourse. There's clearly no bestiality. So you would have to find that this occurred with an intention to do so, number one. Not just an intention to film, but an intention to use or coerce or cajole her in some

fashion to engage in explicitly sexual conduct. That he had to somehow intend that, have that happen, film it, and intend to film it. All of these things need to be met.

So you can review and -- was there any lascivious conduct? Was she doing anything sexual while she was there? I submit she was not. She didn't know the camera was present. She took a shower. She cleaned herself off and that's all she did. There was nothing sexual about it.

The government would like you to believe that somehow it is sufficient that if a person looks at or views an image and is aroused by it, that in and of itself is sufficient. It is not. For instance, there is some of these morphed images that the government has provided. He had an ex-girlfriend, the prom photo, for example. Now, you'll have to do an analysis if you're looking at that photo. Is that pornography? Again, it's not good. We're not condoning it. But is it pornography? Does it have the definitional meaning? Lascivious. Is it lascivious? Is it focused on the genital region? I know this sucks to talk about, but that's what your analysis is. It doesn't. It just doesn't. It's literally a person standing.

There are many other images just like that: People standing and that is all. Nothing sexual at all with the nature of the photo. And the fact that he masturbated to it or liked it does not change by magic what's in the photograph.

No more than if someone masturbates to a Sears catalog, it doesn't make the Sears catalog pornography. So you need to look and analyze and evaluate the image. That is your purpose here.

So please don't skip over the important parts here to determine whether in fact this is pornography and what his role was, particularly in count two. He placed a camera in a bathroom, but they also have to prove that he intended to create child pornography. That he intended to use or coerce M.C. to engage in sexually explicit sexual activity for the purpose of creating child pornography. That's the definition.

We have the video and that's essentially all that we have to establish what happened and what the circumstances were. That's the entirety of it. That's why they have brought in a lot of this other evidence that isn't charged today to try to show that he's consistent in his behavior and he does this a lot and he's done it before, right? That was the purpose. He's not charged with it, but that's why it's relevant.

They told you to listen to E.S. right at the end there, right? Again, E.S. was another one of David's victims. You heard about her story where back when she was 15 or so, high school age, there was a video taken of her taking a shower. It also included David's own sister. And she heard about this from David's sister and confronted him about it.

Now at that time, bear in mind, they were of similar age. They were about a year or so apart. So he -- both around 15, 16. Like the age frames, it wasn't exactly clear. So at that point in time, he was also high school age. This is not somebody who is 30 or 40 years old. They're the same age.

Additionally, it would seem to be the case that he certainly would not have wanted to film his sister. The cousins are not blood related as testified to. They are step cousins. So he's got this video apparently that his sister was in. I imagine that -- and you can decide based on what you've heard whether that was an intentional act; that he was intending to create that of his sister. I would suggest probably not, but you can decide that.

But you also heard that this cabin -- sounds like they've got a pretty big family and they've got a lot of people there and they're telling you how prolific he is at this voyeurism stuff and placing cameras in bathrooms. We don't know how many times it's been done. We don't know how often it happens at the cabin. We don't know if it was done 8 or 10 or 12 times that day with multiple people. We do not know because the evidence hasn't been presented.

So did he intend specifically for the camera to film M.C. or did he intend for the camera to film whoever happened to walk in? We don't know. They haven't given any evidence

or any surrounding circumstances. They haven't called anybody that was there to corroborate who might have been there at that particular date and time. They didn't give you any pictures of what the shelf would have looked like and where he placed it. They didn't give you anything. They just showed you the video. And then they showed you a bunch of stuff that happened at various other times to various other people and want you to presume things based on that.

But I will tell you as far as the voyeurism evidence is concerned, what you have seen -- while you didn't see this video purported to have happened many years ago in high school, you saw another video, same cabin, with another family member who, again, I submit, is another victim. There's no denying it. But that was of an adult. And again, probably a violation of other laws but not these laws.

So who knows how many times, how often this may have occurred, and if it was just something he was doing at a very high clip with multiple people and happened to have one, maybe other people, that he didn't intend to, we don't know. We have nothing in regard to the intent in that specific moment. We just have conjecture about it based upon past behavior.

But note too that of all the voyeurism videos that you've been given, all the rest are adults. Again, they're not good, but they're of adults.

The patient that he had, of course, is horrifying.

Taking an up-skirt photo of a person that's in your office and putting their faith and trust in you to talk about what are assuredly sensitive issues for somebody young and in high school is horrific to do that, but it's not pornography and it's not child pornography because the patient was over the age of 18. The government has argued and I think will argue that, well, it was very close, by a few days. Well, would that not show that his intent here in his perverted behavior was to avoid filming somebody under 18? If he's had a long-time patient week after week that he's meeting with and he knows how old she is and he waits until the appointment five days after she turns 18 and that's the video that he takes, wrong as it is, it doesn't show an intent to film a minor. It shows literally the opposite: the intent to film an adult.

The government may go and show this exhibit now that indicates the report says 17 years old on it. She's not. She was 18. It also doesn't describe the same clothes she had on that day. So they can pull that up. Probably will. But note that she was literally 18. He did know it. It was another part of the report where he notes that she's 18. That's what happened. They didn't tell you a whole lot about it. They just introduced a document, but you can review the document yourself and you can note what that document says that she was wearing that day. It was not a skirt, right? So some of this

stuff is just left over from prior appointments presumably, but you make that call.

Now, with respect to some of the other, again, evidence that he's not charged with, there's this file list of very suggestive names. Horrifying stuff, no doubt. Again, no images. Nothing. It's literally just text. I said that, I think, in the opening. I said it during trial. The reason that's critical is because we really don't know what it is. No matter how suggestive it sounds or how horrible it is, there's no evidence of what it is at all or where it came from or anything.

And how does it get there? This is important. The reason why I spent so long blabbering about the whole idea of these cache files and the thumb drive, why I care so much and why we're putting that forward so much is the government's getting up here and arguing that access means something different than access really means. The suggestion is that when you see this metadata and access, it means that the person opened it or viewed it or did some tangible thing with the item. That's not what it means. It just means one device was plugged into another and that is all. Mr. Whitt told you about that. We went over that very carefully and that's important.

If you recall, I pulled up multiple instances of screenshots and thumb shots and such on this MacBook that were

accessed allegedly on September 10, 2021. They all had the same access date. Not only that, they had the same access time. Not only that, the same access second. So unless he was watching 85-some-odd videos simultaneously, I would submit that, no, that access date is not a date that it was opened or viewed. It was only a date that somebody put some drive into a computer and that's what creates it. That's the point.

So look carefully. You'll have the exhibits. You can look for yourself. Recall I was asking what does this even mean? What is this stuff, the metadata? Read through it. Look how the dates match up. Look for other dates. The video of M.C., for example, there's a creation date and a modified date from six or seven years ago. There is no other indicia of ever viewing or watching it in any recent term whatsoever. That is false.

I told you in the opening statements -- if you recall, the government submitted to you that in their case they were going to show you that the video of M.C. was played, opened on the MacBook. And I told you, no, they won't, if you remember that. Money back guarantee. No, they will not prove that because it didn't happen and they don't have evidence of it. Lo and behold, there is literally no video of it on the MacBook. What is there? The quick view thumbnail. That is what's on it and that is all. That's why we spent so much time with that. And how does the QuickLook thumbnail get on

there? Putting the drive in populates it, just the thumbnail. That's it. You can't even access the thumbnail without special software. There's no video on the computer. It's just a thing that's on there that you can't even see. So no, all of this stuff that they're saying is accessed and viewed on the MacBook, there is no evidence of.

Let's talk about this playlist again. It's the same concept. Look at the playlist. The entire list is populated at the same time, June 29th. They're going to tell you it's a Morphus login. They didn't look anywhere else that day, but they're going to just assume because it says that, it was him. You heard from at least a couple witnesses, but certainly from the main investigator on the case, Mr. Atwood, Agent Atwood, that we called, who had interactions with his wife and knows that it was a jointly used device. Knows that multiple people did have access, did use it.

Again, I'm not suggesting that stuff was planted. Don't get me wrong. I'm not suggesting that someone got framed here. What I'm suggesting is just because there's some image or something pops up, it's not -- the only conclusion anyone could ever draw here is that it's David Tatum who's responsible for this image. That's not the case. They want to suggest that he's carrying around some images and watching them constantly on a MacBook computer and deleting them, or whatever the case may be. No, that's not the case. The only

remnants of it are because a drive gets plugged into a device. That is it. That is all. The government's own witness told you that.

That's the evidence on the MacBook. And we don't know when or who was on the computer and who might have plugged the device in. So to suggest that he was watching a video on September 10th or something when there's multiple instances of the exact same time having the exact same access date, you can use your common sense on this. It's just thumbnails. That's all it is.

So look carefully at the metadata. Trust or not trust it at your discretion. That is your prerogative as the jury. But listen carefully to the instructions. Think carefully about the evidence and things you've heard, particularly with regard to the analyst who gave you a lot of detail, a lot of good information. He provided a lot because this is a digital case with digital evidence. That's really basically all of it as far as the tangible evidence other than testimony. So Mr. Whitt gave you a ton of information to consider about how this process works.

I asked a lot of questions about -- we delved into what is pthc, and such, in part because -- again, I guess you can use a common sense assessment of it because there's no specific definition that was given. But preteen hardcore, again, the evidence that is here for Mr. Tatum is (A) that he

doesn't know what that is, is not familiar with it, but (B) no particular evidence to speak of that even implicates that there was anything preteen or hardcore anywhere. The only implication are supposedly these file paths generally that have some pretty horrific names. But keep in mind this is a person, as I said before, a prolific collector of pornography in general, including a lot of adult pornography, including a lot of anime. We had a conversation about that too. That's the Japanese cartoons. You can see some on Netflix, the normal ones. I've watched them. They're fine. There's a subsection, subgenre that is some pretty nasty crap. It includes depictions of minors. It includes them doing sexual stuff in comic books and in videos and stuff. We talked about that.

And we talked with Mr. Whitt about common things he might see in terms of names. We talked about the Lolita or Loli or Lolicon and stuff like that. He wasn't a hundred percent familiar with exactly what it is, but he gave you a couple of examples like, yeah, younger looking, even like really, really young looking people in Japanese cartoons and such. Again, not child pornography because it doesn't meet the definition of having, you know, a person in it that you guys are tasked with doing today. But it was on there. There's a lot of it. And note some of the file paths. They talked about the file paths. That list they gave you has got

the name of a file that does not have -- they showed you a file, but the list you have does not have the rest of the file path. So that file path is related to a comic book that says the Loli part in there, Chapter 4, whatever it is. Again, we don't know what it is. They didn't produce that. But that is one of thousands upon thousands. I think they mentioned the Loli search was like 10,000 files. Again, we're talking about a lot here, a lot of adult pornography too.

And so what the government has presented is a handful of images and photos that are, other than the family members that you've heard from, largely people we don't know, don't know the age of, don't know the identity of, don't know really where they came from, and don't know otherwise if they are in fact child pornography because even if you see sexual behavior that does meet the definition quite clearly, like a sexual video that's obviously pornographic, you still have to determine they're a minor beyond a reasonable doubt. You may think maybe, probably. That's not good enough. It is beyond a reasonable doubt.

If you're a sports fan or something, if you've ever seen where there's a play and they make a call, someone challenges the call and they say, well, it's presumed that the call on the field stands unless there's clear and convincing evidence to overrule it. Okay. That's kind of how this works. He's presumed innocent and can only be convicted if

the government proves by clear and convincing evidence that he's guilty. But not even that. It's a higher burden. It's a beyond a reasonable doubt burden, the highest one we have. Clear and convincing evidence is a standard that they take your kids away. Beyond a reasonable doubt is harder. So keep in mind that that's the standard that you have to weigh all of these decisions.

How old a person is beyond a reasonable doubt. Not based on assumption. Based on the evidence that you have heard and that only.

What about whether it's pornography? Again, beyond a reasonable doubt.

Whether or not they had the jurisdictional requirements, all that word salad that the judge will tell you about. Beyond a reasonable doubt.

Whether or not they've properly attributed things and all of that.

Take everything carefully, sincerely into consideration because these are the easiest cases in the world to gloss over. These are the easiest cases to check those boxes. They absolutely are. But you have a duty and I ask sincerely that you think carefully about all of these issues. You listen carefully to the judge's instructions and you consider this for what it is, which is a series of conduct that they're alleging that is specific and not related to some

of the other folks that came in.

Consider when you're looking at an image is this pornography? Is the focal point on genitals? Is it intercourse? Is it that or not? Is that present? Is it nude or not? Is it all of those factors? Consider each and every one of them. Consider them in the context broader of the statute and what this is supposed to prevent. The production charge in particular is supposed to prevent the filming of sexual abuse. Look at the statute. Read through it yourself. Look at what the examples are of things that the government would have to prove. Look how severe they are. And consider the definition very carefully and ask yourself whether or not that occurred here.

No matter what you think, no matter how horrible you think the behavior was, the guilty verdict only comes, only comes if you believe beyond a reasonable doubt that he committed the specific acts specifically delineated in that statute. For count two it's only one video and only one video applies.

You can also take into account to some extent things you didn't hear about. You can't speculate on evidence you wish you knew, stuff you wish you knew, wish you heard about, wish you saw. You have to go with the evidence presented and any reasonable inferences therefrom.

You're going to have those documents back there as

well to work from. I would ask you to go through them carefully. Some of them may not be pleasant. But in particular, some of the metadata, some of the more technical information. And consider carefully whether or not some of the allegations here are what they appear to be. Again, we're not saying anyone got framed or anything. The question is were they or were they not accessed on certain dates and times? Were they even on certain devices? Is there any evidence of any of these things?

Be careful in going through that and be careful with being overcome with emotion, which is pretty inevitable, obviously, in a case like this. It's hard not to be that way. Okay. I get it. I understand. But we've got a system here that works for a reason. We all have a part in that and you have that today.

And I really, really appreciate your time and I appreciate your patience with me and all my blabbering all the time. I appreciate the people that came out to participate in this trial. I know that's hard. You guys know it's hard too. And I hope that you can do what is fair and what is right in your serious consideration of all of the evidence. And it's not checking boxes and it's not just assuming things and it's not easy whatsoever. This should not be easy. It's not easy for anyone. It should not be easy for you. You have an important, important job. I know I keep saying it over and

over again like a broken record. It's for a reason. When I'm repeating something and I can't stop talking, it's because I think it's pretty damn important. So please consider all of those matters that I spoke about. Think long and hard. Think carefully. Ask questions if you have them. Talk to each other.

I appreciate your time. Thank you.

THE COURT: You have 23 minutes, Mr. Cervantes.

MR. CERVANTES: Thank you, Your Honor.

Let's talk about what we agree with and what we don't agree with because apparently there is some common ground here.

Number one, defense agrees that Dr. Tatum is the one who recorded, who made that recording of M.C.. That's beyond dispute. And the evidence proved it anyway. His family members identified him. He's in the video. That's not an issue. They've conceded it.

They also agreed this is criminal. This is criminal, ladies and gentlemen. But they want a technicality. Criminal, but not the criminality here. We submit to you it is the criminality here. We're going to go through that. We've gone through that. Mr. Odulio explained that to you. But they want you to find through some technicality that isn't actually applicable and doesn't work with the facts of this case to find him not guilty.

We also agree that we don't know how many recordings he's made. Who knows how many recordings the defendant has made of other victims, of other minors, other adults. How many? Only the defendant knows. We found some. We presented those to you. We found four: The first bathroom video of M.C.; the second bathroom video of K.C.; E.S. testified to one of her and the defendant's sister when they were both minors; and F.L.. She also testified he did those three sets of recordings, which is another point of agreement. He agrees to that. He agrees that he made that recording. He agrees that it was wrong.

We're not here, though, to say, hey, convict him because of the F.L. recording. To be clear, he's not charged with that. But that recording informs your decision of what his intent is in making the recording of M.C., the first bathroom video. Where did he point it? Where did he point the camera? What kind of voyeur is he?

A voyeur is someone who records other people. Okay. But he's a sexual voyeur. He's not interested in recording people without their knowledge going about their business in everyday life. He's interested in recording them in the bathroom, the most intimate of places. What happens in the bathroom? You take your clothes off. Why didn't he do a recording somewhere else? Even a bedroom. Lesser chance that you're going to take your clothes off. Maybe. I don't know.

But a bathroom you're surely going to take a shower. And he knew exactly what was going to happen because he set it up 20 seconds before M.C. went in to go shower. Then he comes in right after, retrieves the camera and keeps it all these years. Where does he keep it? Where does he save it? He didn't look at it and say, oh, boy, my 15-year-old cousin. They're family. There's no doubt -- although it wasn't admitted to by defense here, but there's no doubt that he knew how old she was. They're family. She was 15 at the time.

He didn't look at that and say, hey, I probably shouldn't have done that. No, he deleted it from his phone. He put it in the hard drive. He saved it for all these years. Since 2016 that video has been saved. And where is it saved? In his library of pornography. It's not saved in a folder that says mistakes of my life, things I regret. It's saved together with his material that he uses to get off.

We don't agree on a lot more than we do agree on. This isn't art. None of these images are art. None of these videos are art. He didn't ask M.C. on the stand: Don't you think this is an artistic view of you naked in the shower? Is that art?

He also misstated the law. As the judge said, you need to follow the judge's instructions. But I'm going to do my best to restate them correctly.

So the defense suggested to you that somehow M.C.

needs to do something in the video. It's on M.C.. Let's shift the burden, ladies and gentlemen. Let's shift it to the victim to make sure that this video can only qualify as child pornography if the child is the one who does something sexual. Let's switch the burden to the victim. He'd like that. The law is not like that.

So the law -- this is the document that the defense showed you. Definition of sexually explicit conduct.

Number 1, sexual intercourse.

So in terms of -- the pornography here, as I told you in the opening, there's several portions, there's several types, right? Let's go for low hanging fruit, as Mr. Odulio told you. The first video we showed you of the two girls that were approximately 11 to 13 years old. There's no doubt about that. This doctor is a child psychiatrist. Most of his patients, 75 percent of his patients were children. He knows what children look like. And even if he didn't, just look at the video.

Sexual intercourse. They were engaged in that.

The last category is the category that would apply to the M.C. video because she did not engage in sexual intercourse. So I guess we can agree on that.

So what does sexually explicit conduct mean when we're talking about the lascivious exhibition of the genitals or pubic area of a person? We're not here trying to prosecute

parents who are taking pictures of their kids and they happen to be in the bathroom. That's not what the law says. It is the lascivious exhibition. And there's guidance that you're going to get to what the lascivious exhibition of the genitals means. That's what makes it criminal, right? And there are factors. These are factors, okay? Some of the factors are applicable here.

The first one, what is the focal point? The focal point, the angle of the video in the bathroom is directed towards Monica's crotch.

Look at the setting. It's in the bathroom. As I said, this isn't a voyeuristic video of them on their family vacation and M.C. out on the lake or something like that. This was designed to record her in her most intimate moment, in the shower, to capture her naked. Not just naked, but he set it up from the ground up to capture her groin area.

Number four, she's nude. Totally nude.

Number six -- this one, I think, is the most debated between the two sides, right? What is the -- what is the intent or design of this video? Does it elicit a sexual response in the viewer? The defendant has already told you what he does with his material. The defendant took the actions of taking that video and preserving it. What is it designed to do? It is designed to satisfy his urge to create these videos, to satisfy his sexual urge.

What if -- what if M.C. in that video actually had started doing something to herself, masturbating? We wouldn't be having this conversation, right? The defendant doesn't get a free pass just because the victim didn't do what he hoped the victim would do. Here what he tried to do was record her in the bathroom so that he could use that video for himself.

He says that he's only interested in recordings of adults, but that's not true. His child pornography material you've seen involves minors. That can't be in dispute. The modified images, some of those girls were at least under 10 years old. That's up to you to decide by looking at the images. I mean, you've seen them here. You can tell. Some of you even told us during jury selection that you have children. You know what children look like even if you don't have them.

But the facts contradict his contention that he's only interested in adults. Let's talk about F.L., for example. The defense was right, I was going to show you that document.

This is the medical record of the defendant's visit -- or Faith's visit with the defendant. You can see that he is the listed provider. No doubt about that. He agrees that he treated her and even agrees that he made the video.

What I want to highlight is that the defendant

believed that she was under 18, right? The defense has highlighted the fact that five days before this meeting she had turned 18. But what I'm asking you to do is look at what the facts suggest to you was the defendant's belief of what he was doing. The facts show you that he believed she was 17. He didn't know she had just turned 18 five days before, and he tells you that in his notes.

He says, "F.L. is a pleasant 17-year-old white female." I'm showing you Government's Exhibit 11. "She is in 12th grade at Penfield High School.

"F.L. is a 17-year-old girl who has a chaotic childhood with a dysfunctional mother and is now being raised by her father who is a single parent and works many hours a week typically."

This is who he took advantage of. He didn't believe -- he didn't know she had turned 18. So in his mind -- in fact, what he tried to do was even make another production video. He's not being charged for the F.L. conduct, I'll say it again.

But this is instructive of what he was trying to do when he made the video of M.C.. It's hugely important because, as we've talked about, you can never really know. Unless you have some way to look into his mind, you look at conduct. And that's just using your common sense. We do that all the time. What someone intended to do, you look at the

circumstances and you decide what it's consistent with. And here he thought he was recording a 17-year-old girl.

Now, the defense also says that there's no evidence that the defendant accessed the M.C. video. First of all, we don't have to prove that, right? The elements for production don't require us to show you that the defendant was sitting there watching the video. We could stop short at the moment that he recorded that video because the crime is complete. We could show you that he completed the crime as soon as the video was complete and everything we've shown you after that is really just corroborating evidence, right? Our job is to prove this to you beyond a reasonable doubt, so we're going beyond just proving the elements of the offense. All of these other facts, they don't go to establish the elements. You'll see that when you're breaking down the elements and what facts support them. It's not -- there isn't some requirement there that the defendant viewed the image, right? We're showing that because it shows what he did with it.

And there's proof that he accessed it. So contrary to the defendant's statement, Exhibit 5K shows you -- this is the metadata from the MacBook that has the same thumbnail as the M.C. video, right? It is a thumbnail created of the M.C. video, excuse me. It has -- the file name is the same file name. Thumbnail last accessed date/time: September 10, 2021. What does that tell you? That tells you that the hard drive

was plugged into the MacBook.

What else did we show you about that hard drive? That's the My Passport hard drive. It was encrypted. No one knew the password to get into the hard drive. We had to send it to Quantico. There's another important fact there. The only way that the Mac is going to be able to generate this information about that file when the hard drive is plugged in is because the hard drive is unlocked when it's plugged into the Mac. That is how the Mac can retrieve that data and store it in its hard drive.

And how is it that the Mac could have accessed the thumbnails of the image -- of the video? How is it that the Mac could have accessed all of this metadata about the M.C. video? That's because the user knew the password. And the only person in this courtroom who knows the password is the defendant. And it's not Kim because when she gave us the hard drive, we obviously had to send it to Quantico.

But even if all of that fails, even if all of that fails, which it doesn't, what is -- what was the defendant's intent? What was he trying to do?

So Mr. Odulio has explained to you that count two, the production, has attempt. It also includes attempt. What was the defendant trying to do with this video? Because again, the law is not going to give him a free pass just because he was inept in committing his crime or because he was

fortunate enough that M.C. didn't do something to herself in that video to make it clear that it's child pornography. The law does not forgive him as such. Accordingly, when you're charged with an attempt, you can be convicted of the substantive offense if you have the intent to commit the offense and you take a substantial step toward that offense. Those are the first and second elements that you see on the screen. Intent to commit the offense and substantial step toward it. Everything we've talked about applies to that.

THE COURT: Three minutes, Mr. Cervantes.

MR. CERVANTES: Thank you, Your Honor.

Finally -- well, two more points that I'll try to get into three minutes.

The -- we don't agree that the defendant doesn't know what pthc is or that he didn't have -- that there was no access. So let me just go back to this really quick, this list, right? I'm not going to read these file names again. This is 5C.

What is the evidence? So this is just a list, data that's pulled out of the MacBook. It's a list of all these horrible sounding files. So that's evidence, right?

Mr. Whitt testified that in his experience, pthc is consistent with child pornography. And that in the rare, rare situations, he has seen a few files with pthc that involve adult pornography; but in those files, the file names, there's

usually some indication as well in the file name that there's something related to adult.

So go ahead and look through all of these 1,118 rows and try to find one of those rows that indicates adult and take that out. You're going to be left with probably another thousand, if that, just to be generous and to give him the benefit of the doubt. And it was rare.

But there's more because Exhibit 5D, right? This is the one that shows you what was played. This is the history of what was played on the MacBook, 5D. It shows you that this VLC was first run August 6, 2019. I asked Mr. Whitt so what does that mean? He said basically it means that these videos here were all played sometime after that date to the date that the MacBook was recovered. All right. So these videos. And these videos we linked back to three of them that were on this list showing that they were played. Those three -- I just took three examples -- were played sometime, because they're on this list, sometime after August 2019.

Finally, the defense wants you to believe that it's only child pornography if you can identify who the minor is. He's made some -- if you know the identity. And that's just simply not true. First of all, it's irrelevant when it comes to M.C. because obviously she's family. So I think he's suggesting that some of the other minors depicted in the other videos, it can't be child pornography unless you know the

identity. And that simply isn't true, right? It is use of a minor. We know that he used a minor. We know he used M.C.. We know she's real. You saw her.

And then identifiable minor, right? What we're talking about is the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. You can use your judgment and common sense. When you walked in here the other day, we never said, hey, leave your experience at the door and just make decisions in a vacuum as if you have no real world experience. This is the point of having a jury because people like you --

THE COURT: I'm sorry, Mr. Cervantes, please conclude.

MR. CERVANTES: Use your common sense. They're minors.

Thank you.

THE COURT: All right. Members of the jury, I don't like reading to you. You probably don't like being read to. But the instructions that I'm about to give you will be with you in the jury room. I don't expect you to memorize these. In the sense they will be with you in the jury room, I need to make sure that I say exactly the same thing out here, that you will have virtually my words ringing in your ears in the jury room. So you can continue to take notes if you'd like, but

you will have these instructions.

I will now read count one in the bill of indictment, to which I will refer to as the bill of indictment or just the indictment. I will then read the statute that the defendant is charged with violating. Finally, I will tell you the essential elements of this offense. You should keep in mind as I review this charge that you will have a copy of the bill of indictment with you when you go into the jury room to decide this case so it will not be necessary for you to try to memorize the charge. I remind you that the indictment is not evidence.

Count one reads:

From in or about July 16 through on or about September 22, 2021, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, David Tatum did, and did attempt to, knowingly possess, and access with intent to view, any material that contained an image of child pornography, as defined in Title 18, United States Code, Section 2256(8), and that has been mailed and shipped and transported using any means and facility of interstate and foreign commerce, and in and affecting interstate and foreign commerce by any means, including by computer, and that was produced using materials that have been mailed and shipped and transported in and affecting interstate and foreign commerce by any means, including by computer. All in violation of

Title 18, United States Code, Section 2252A(a)(5)(B)6.

You will note that the bill of indictment charges that the offense was committed on or about a certain date or dates. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense in question was committed on a date reasonably near the date or dates alleged in the indictment.

Where a statute specifies several alternative ways in which an offense can be committed in the disjunctive, or using the word "or," the bill of indictment may allege the several ways in the conjunctive, or using the word "and." You may find the defendant guilty of the offense if you find beyond a reasonable doubt that he committed one or more of the means of violating the statute. Thus, where the indictment uses the term "and," you may consider it as "or" unless I specifically instruct you differently.

Title 18, United States Code, Section 2252A(a)(5)(B) provides, in pertinent part, as follows:

Any person who knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed or shipped or transported using any means or facility of interstate or foreign commerce, or in or affecting interstate

or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer, shall be guilty of an offense against the United States.

For you to find the defendant guilty of possession of child pornography as charged in count one of the superseding bill of indictment, the government must prove the following essential elements beyond a reasonable doubt:

First, that the defendant knowingly possessed, or accessed with the intent to view, any material that contained an image of child pornography, as alleged in the superseding bill of indictment;

Second, that the material had been mailed or shipped or transported using any means of interstate or foreign commerce, or in or affecting interstate or foreign commerce by any means, including by computer, or was produced using materials that had been mailed, shipped, transported in, or affecting interstate or foreign commerce by any means, including by computer; and

Third, that when the defendant possessed or accessed with the intent to view the material, the defendant knew the material contained an image of child pornography.

I will now define certain terms used in the definition of this offense. You are to apply these

definitions as well as those I have given you previously as you consider the evidence as to these offenses. If I do not define certain words, you will assign to them their ordinary, everyday meanings.

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident.

Ordinarily, there is no way that a defendant's state of mind can be proved directly because no one can read another person's mind and tell what that person is thinking. But a defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the defendant said, did, how the defendant acted, and any other facts or circumstances in evidence that show what was in the defendant's mind. You may also consider the natural and probable results of any acts that the defendant knowingly did, and whether it is reasonable to conclude that the defendant intended those results.

The government must prove beyond a reasonable doubt that the defendant possessed a visual depiction. To "possess" something means to have it within a person's control. This does not necessarily mean that the person must hold it physically, that is, have actual possession of it. As long as the visual depiction is within the defendant's control, he

possesses it. If you find that the defendant either had actual possession of the depiction, or that he had the power and intention to exercise control over it, even though it was not in his physical possession, you may find that the government has proven possession.

The law recognizes that possession may be sole or joint. If one person alone possesses it, that is sole possession. However, it is possible that more than one person may have the power and intention to exercise control over the visual depiction. This is called joint possession. If you find that the defendant had such power and intention, then he possessed the depiction even if he possessed it jointly with another person.

"Child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where:

One, the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

Such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

Three, such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

Additionally, you are instructed that as long as the face of the person depicted in the image is an identifiable minor, it is irrelevant whether the adapted or modified body is that of an adult or a minor. If such imagery reflects sexually explicit conduct, it is child pornography.

The term "minor" means any person under the age of 18 years. When you consider whether a person is under the age of 18, you may use your life experience in observing children. The government does not have to prove that the defendant knew that the victim was less than 18 years old.

The term "sexually explicit conduct" means actual or simulated:

One, sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; or

Two, bestiality; or

Three, masturbation; or

Four, sadistic or masochistic abuse; or

Five, the lascivious exhibition of the anus, genitals, or pubic area of any person.

The term "lascivious exhibition" means a depiction that displays or brings to view to attract notice to the

genitals or pubic area of children in order to excite lustfulness or sexual stimulation in the viewer. Not every exposure of the genitals or pubic area constitutes a lascivious exhibition. In deciding whether the government has proved that a particular visual depiction constitutes a lascivious exhibition, you should consider the following factors:

One, whether the focal point of the visual depiction is on the minor's genitals or pubic area;

Two, whether the setting of the visual depiction makes it appear to be sexually suggestive, for example, in a place or pose generally associated with sexual activity;

Three, whether the minor is displayed in an unnatural pose, or in inappropriate attire considering the age of the minor;

Four, whether the child is fully or partially clothed, or nude;

Five, whether the visual depiction suggests coyness or a willingness to engage in sexual activity; and

Six, whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

A picture or image need not involve all of these factors to be a lascivious exhibition of the genitals or pubic area. It is for you to decide the weight or lack of weight to be given to any of these factors. Ultimately, you must

determine whether the visual depiction is lascivious based on its overall content.

"Visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter, or a typesetter, or a portable handheld calculator, or other similar device.

The government must prove beyond a reasonable doubt that the material had been mailed or shipped or transported using any means of interstate or foreign commerce, or in or affecting interstate or foreign commerce by any means, including by computer, or was produced using materials that had been mailed, shipped, transported in, or affecting interstate or foreign commerce by any means, including by computer.

A visual depiction was transported in or affecting

interstate or foreign commerce if it crossed between one state and another or between the United States and a foreign country. Transmission of photographs or video by means of the internet constitutes transportation in or affecting interstate commerce. However, you must find beyond a reasonable doubt that the specific depiction in question was actually transmitted by means of the internet, if we were dealing with the internet which is not really the facts before you here.

A visual depiction was produced using materials that had been transported in or affecting interstate or foreign commerce if the materials used to be -- used to produce the visual depiction had previously moved from one state to another or between the United States and another country.

Here, the government alleges the computers used to possess the videos and images in question were manufactured in another state or country. I instruct you that if you find that the computers used to possess the videos and images were manufactured outside North Carolina, that is sufficient to satisfy this element. The government does not have to prove that the defendant personally transported the computers across a state line or that the defendant knew that the computers had previously crossed a state line.

I will now read count two in the bill of indictment. With respect to this count, it only applies to what has been referenced as bathroom one video or the M.C. video, which is

Government's Exhibit 1D.

Count two reads:

From in or about July 2016 through on or about September 22, 2021, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, David Tatum attempted to and did employ, use, persuade, induce, entice, and coerce Child Victim 1 to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct using materials that had been mailed, shipped, or transported in and affecting interstate and foreign commerce by any means, including by computer, and the visual depiction was transported using any means and facility of interstate and foreign commerce. All in violation of Title 18, United States Code, Section 2251(a) and (e).

Title 18, United States Code, Section 2251(a) provides, in pertinent part, as follows:

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, or attempts to, shall be guilty of an offense against the United States if that visual depiction was produced or transmitted using materials that have been mailed, shipped or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or

transmitted using any means or facility of interstate or foreign commerce, or in or affecting interstate or foreign commerce, or mailed.

For you to find the defendant guilty of using a minor to produce a visual depiction of a minor engaging in sexually explicit conduct as charged in count two of the superseding bill of indictment, the government must prove the following elements beyond a reasonable doubt:

First, that the minor was under the age of 18;

Second, that the defendant used or employed or persuaded or induced or enticed or coerced the minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct; and

Third, that the visual depiction was mailed or actually transported or transmitted in or affecting interstate or foreign commerce; or

That the visual depiction was produced using materials that had been mailed, shipped, or transported in and affecting interstate or foreign commerce by any means, including by computer.

I have previously defined several of these terms, including "minor," "sexually explicit conduct," "visual depiction," and "computer." You should apply those definitions in deciding count two as well.

It is a crime for anyone to attempt to commit a

violation of certain specific laws of the United States even if the attempt fails. In this case the defendant is charged in count two with committing the offense of employing, using, persuading, inducing, enticing, or coercing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct, or attempting to do so.

For you to find the defendant guilty of attempting to commit the offense of employing, using, persuading, inducing, enticing, or coercing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First, that the defendant intended to commit the offense of employing, using, persuading, inducing, enticing, or coercing a minor to engage in sexually explicit conduct for the purposes of producing a visual depiction of the conduct; and

Second, that the defendant did an act that constitutes a substantial step towards the commission of that crime and that strongly corroborates the defendant's criminal intent and amounts to more than mere preparation.

A minor is "used" if they are photographed or videotaped.

The term "producing" means producing, directing,

manufacturing, issuing, publishing, or advertising.

The government does not have to prove that the defendant's sole purpose or the primary purpose of engaging in such conduct was to produce a visual depiction, but the government must prove that producing a visual depiction of the sexually explicit conduct was one of the defendant's purposes for using, employing, persuading, enticing, or coercing the victim to engage in sexually explicit conduct. And that it was a significant or motivating purpose and was not merely incidental to the sexually explicit conduct.

In determining -- in deciding whether the government has proven that the defendant acted for the purpose of producing a visual depiction of the sexually explicit conduct, you may consider all of the evidence concerning the defendant's conduct.

The term "interstate commerce" includes commerce between one state, territory, possession, or the District of Columbia, and another state, territory, possession, or the District of Columbia. Interstate commerce simply means the movement of goods, services, money, and individuals between any two or more states or between one state and the District of Columbia.

"Foreign commerce" includes movement of goods, services, money, and individuals from one country to another.

To satisfy this element, the government must prove

that the defendant's conduct affected interstate or foreign commerce in any way, no matter how minimal. The government is not required to prove that the defendant knew his conduct was in or affecting interstate or foreign commerce. In determining whether the defendant's conduct "affected interstate commerce," you may consider whether the defendant used means, instrumentalities, or facilities of interstate commerce. A facility of interstate commerce is some thing, tool, or device that is involved in interstate commerce. Cell phones and the internet are both means, facilities, and instrumentalities of interstate commerce.

The local or intrastate production of visual depictions of a minor engaged in sexually explicit conduct with a computer, a cell phone, or a camera that traveled in interstate or foreign commerce is part of an economic class of activities that substantially affect interstate or foreign commerce.

The indictment alleges that the visual depiction was actually transported or transmitted in or affecting interstate or foreign commerce. This means that the government must prove that the visual depiction crossed between one state and another or between the United States and a foreign country.

A visual depiction of a minor engaging in sexually explicit conduct is "produced" using materials made -- excuse me, materials mailed, shipped, or transported in or affecting

interstate or foreign commerce if the visual depiction is stored, created, or recorded on a device containing materials mailed, shipped, or transported in or affecting interstate or foreign commerce.

Simply stated, the phrase "transported in interstate or foreign commerce" means that the materials used to produce the visual depiction had previously moved from one state to another or between the United States and another country.

Here, the government alleges that the camera and film used to make the video in question were manufactured in another state. I instruct you that if you find that the camera and film were manufactured outside of North Carolina, that is sufficient to satisfy this element. The government does not have to prove that the defendant personally transported the camera and film across a state line, or that the defendant knew that the camera and film had previously crossed a state line.

I will now -- excuse me. I instruct you that a minor cannot legally consent to participating in illegal sexual conduct. A person under the age of 18 lacks the capacity to consent to illegal sexual conduct. Accordingly, any argument regarding a minor's consent must not be considered by you in reaching a verdict.

I will now read count three in the bill of indictment.

Count three reads:

From in or about 2016 through in or about September 22, 2021, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant, David Tatum, knowingly transported and shipped any child pornography, as defined in Title 18, United States Code, Section 2256(8), using any means and facility of interstate and foreign commerce, and in and affecting interstate and foreign commerce by any means, including by computer. All in violation of Title 18, United States Code, Section 2252A(a)(1).

Title 18, United States Code, Section 2252A(a)(1) provides, in pertinent part, as follows:

Any person who knowingly mails or transports or ships using any means or facility of interstate or foreign commerce, or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography shall be guilty of an offense against the United States.

For you to find the defendant guilty of transportation of child pornography charged in count three of the superseding bill of indictment, the government must prove the following essential elements beyond a reasonable doubt:

First, the defendant knowingly transported, shipped, or mailed any item or items of child pornography using any means of interstate or foreign commerce, or in or affecting

interstate or foreign commerce, including by computer; and

Second, when the defendant transported, shipped, or mailed the items, the defendant knew the items were child pornography.

I have previously defined several of these terms, including "knowingly," "child pornography," and "computer." I also defined "interstate or foreign commerce" with respect to count two. You should apply those definitions in deciding count three as well.

Therefore, members of the jury, considering counts one, two, and three, I charge you that if you find from the evidence that each of the essential elements of a count has been proven beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged under that count.

However, if you do not so find, or if you have a reasonable doubt as to one or more of the essential elements of the crimes charged, it would be your duty to return a verdict of not guilty.

Does either party request a sidebar with respect to these instructions?

MR. CERVANTES: No, Your Honor.

MR. AMES: No, Your Honor.

THE COURT: All right. Members of the jury, that's as unpleasant for me as it probably was for you. I just hate

reading to people. I haven't done that since the Harry Potter books to my son. And I read them all, every word of every one.

So you have now heard the evidence and the arguments of counsel for the government and for the defendant. It is your duty to remember the evidence whether it has been called to your attention or not. And if your recollection of the evidence differs from that of the attorneys, you are to rely solely upon your recollection of the evidence in your deliberations, the same as I have said many times before with respect to the law. The law comes from the Court, not from the lawyers.

As jurors, you must decide this case based solely on the evidence presented here within the four walls of the courtroom. This means that during your deliberations, you must not conduct any independent research about this case, the matters in the case, the individuals or groups involved in the case, or any legal concepts. Your duty to follow this instruction is a serious responsibility and the failure to follow it may result in being found in contempt of court.

During your deliberations you must not communicate with or provide any information to anyone by any means about this case.

I have not reviewed the contentions of the parties, but it is your duty not only to consider all of the evidence,

but also to consider all of the arguments, the contentions and positions urged by the attorneys, and any other contention that arises from the evidence and to weigh them all in the light of your common sense and as best you can determine the truth of this matter.

The law, as indeed it should, requires the presiding judge to be impartial. Therefore, do not assume from anything I may have done or said during the trial that I have any opinion as to what your verdict should be. I do not.

I instruct you that a verdict is not a verdict until all 12 jurors agree unanimously as to what your decision should be. You may not render a verdict by a majority vote or by any other voting mechanism other than a unanimous verdict of 12.

The Court suggests that as soon as you reach the jury room before beginning your deliberations you select one of your members to preside as foreperson. The foreperson has the same vote as everybody else but just serves to lead the discussion.

If you need to communicate with me once you have begun deliberating, the foreperson will send a note to me by -- I think there's a buzzer in there that will ring through into here that will let us know you need to communicate with us. Just push that button and write down a note and tell me what you need to ask or any other reason you need to reach out

to me. But if you do send me a note, do not tell me how you stand in your vote. If you're 6-6, 11-1, I don't care and I don't want to know. If you have a question, just ask me the question.

As soon as you have reached a verdict as to the count alleged in the indictment, you will return to the courtroom and your foreperson will, upon my request, hand the verdict sheet to the clerk of court. There are places on the verdict sheet for the foreperson to enter the verdict, sign it, and date it.

During the trial, of course, there were many items put into evidence. If you need to see any of those items, let me know that. That's all electronically available. Well, for the most part except for electronic devices. And Ms. Kirk will show you how to use the electronic evidence system to access any of the exhibits you need to see. So if you need that, let me know and we'll set that up for you.

If you need a break during deliberations, you may do so in the jury room. Or if you need a break outside the jury room, if you have -- someone needs to smoke, for instance, you'll be escorted out of the jury room by a court security officer. But if you are not together, that is, if someone is in the restroom, for instance, do not deliberate. Have no deliberations unless all 12 of you are present at all times.

All right. So, members of the jury, please now take

this case and, as best you can, tell us the truth of the matter.

Once deliberations start I don't want you leaving the courthouse facility so we're going to have lunch brought in for you. I don't know if you already knew that. I hope we chose correctly, or you did.

All right. The case is now with the jury.

(Jury exited the courtroom at 11:10 AM.)

THE COURT: Mr. Ames, have you and your client come to a decision about what you want to do with the forfeiture count in the event of a guilty verdict?

MR. AMES: Yes, Your Honor. Your Honor, yes, we spoke about it last evening and confirmed just now again that he's fine with not having the jury consider that and that Your Honor can do so.

THE COURT: All right. Thank you.

Anything else we need to address while the jury is out?

MR. CERVANTES: No, Your Honor.

MR. AMES: Your Honor, I didn't want to interrupt during closing arguments because I think that's rude. I do want to note there was a position stated that the encrypted hard drive being attached to the MacBook would not populate this metadata with regard to the QuickLook thumbnails and such that was made during closing argument. I didn't object at the

time. Again, I didn't want to interrupt. But I certainly do object to that statement being submitted. It was not in evidence, number one. Number two, it was something that was asked about to which the analyst, Mr. Whitt, said he wasn't sure. He doesn't know and wasn't sure.

You know, I specifically -- I think my question -- it was a leading question, but it was: Have you heard about anything with encrypted drives and such with Apple products in particular about them bypassing that encryption stuff despite having a password? There was an exchange about it, to which my best recollection, Your Honor, and I'm not a thousand percent sure but pretty sure that Mr. Whitt said he wasn't sure about encrypted drives being inserted and therefore populating these thumbnail -- this thumbnail evidence is what the government is relying on as a time frame of when things were accessed.

THE COURT: Well, with respect to any potential misstatements of the evidence, we'll have to rely on the jury's recollection of the evidence, as I have instructed them more times than not. And even with respect to your both opening and closing arguments, you injected supposed facts that were not in evidence, particularly that Mr. Tatum is a sex addict and has sought treatment for such. There was no evidence to that effect. You said it both during opening and closing. We'll hope the jury abides by the Court's

instructions to consider only evidence that was admitted and not the arguments of counsel.

Now, I'm going to ask everyone to stay within finding distance. The jury will probably send a note out fairly quickly asking for the exhibits, but I didn't want to just necessarily put that on them.

Obviously with respect to the alleged child pornography, we'd have to bring them back out here. That's not on the JERS system. We'd have to bring them back out and put them in the jury box and let them see anything they want to see again. So please stay close and available in the event that we get a question from the jury because I don't want to delay answering their question because I can't find any of you.

All right. We'll be in recess pending word of the jury.

(Recess pending a verdict at 11:14 AM.)

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THURSDAY AFTERNOON, MAY 4, 2023

(Court back in session at 1:45 PM.)

(Jury not present.)

THE COURT: All right. We have a question from the jury which I'll read to you.

It says, "Do we consider the defendant's motivation and point of view of what he thought would be 'lascivious

exhibition' when he took the 'Monica' video, or do we view the video in a vacuum to determine if the video is 'lascivious exhibition?' Do we consider his parking lot interview where he admits to being a voyeur and 'getting off' if we consider the video not as a stand-alone but from the defendant's point of view and his motivation for taking it?"

I think the correct legal answer is: "It is for the jury to determine whether an image or video is lascivious as the Court has defined it for you. In considering this question, the jury may consider all of the evidence and draw reasonable inferences from the evidence. The defendant's motivation or opinion regarding lasciviousness is not controlling."

MR. CERVANTES: May we confer?

THE COURT: You may confer, yes, of course.

(Counsel conferred.)

MR. CERVANTES: Your Honor, the instruction seems fine to us except the last sentence. We would ask that the last sentence either be struck or more specific reference to number 6, the last bullet for the definition of lascivious exhibition because that last sentence seems to be inconsistent with that last bullet point.

THE COURT: Yeah, what I'm wondering there is -- and I get your point. When it says "whether the visual depiction is intended or designed to elicit a sexual response in the

viewer," who's the relevant viewer there? Is it the person in this case who produced it or in this case is the juror the viewer?

MR. CERVANTES: We would argue that it's the defendant, Your Honor.

MR. AMES: I would argue at a minimum it's vague, Your Honor. It could be -- it could be the juror or it could be the royal we. It could be a potential viewer.

I think this is one of the more difficult aspects of the analysis for the jury in general. There's actually a decent amount of case law because so many of these cases, when we're in a situation where there's not this just clear and utterly overt sexual nature to a video, this is often -- we're often in category 5 and we're often in the *Dost* factor number 6 as one of the sticking points.

You know, I've just kind of browsed through recently. There's some cases very similar. *McCoy* out of the Eighth Circuit from last year. There's one I was looking at just yesterday actually, *U.S. versus Hillie* out of DC. And this is actually -- this case has gone up and down and up and down a little bit where there's been a rehearing.

But the most recent, United *States v. Hillie*, number 19-3027, a decision from 6/28/2022. It involves -- just pulling up the facts here, Your Honor. The jury convicted Hillie of producing and possessing child pornography. The

panel reversed the conviction based on -- it held that a child does not engage in a lascivious exhibition under 2256(2)(A)(v) -- (5), I guess, unless she displays her private parts "in a manner that connotes the commission of one of the other four sexual acts in the list."

And then that was the initial part -- the initial definition. And then upon rehearing and reconsidering it, the Court then said that -- and clarified it's commonly defined as lustful, tending to arouse sexual desire. And the phrase lascivious exhibition of the private parts -- sorry -- basically, just that the -- the summary is that it objectively needs to be sexually suggestive in this opinion in *Hillie.*

There's also an Eighth Circuit case that I read a little -- just actually about an hour ago. It involved a shower in defendant's master bathroom. The district court sentenced defendant. The Eighth Circuit reversed finding the evidence presented was insufficient. The Court explained that the underlying indictment prevents a person from using a minor to engage in sexually explicit conduct, which I think is the same theory here. Congress in turn defined sexually explicit conduct as lascivious exhibition, not mere nudity, applying the statute. The Court concluded no reasonable jury could have found -- sorry, Your Honor, I'm looking right here. But I can give you a citation for that as well. *United States versus McCoy*, M-c-C-o-y, number 21-3895. That's also from

last year, 2022. And there's a few others.

I think that in many that I've read, the -- with this particular *Dost* factor and this particular situation of potentially a use argument and this viewer issue, I have seen at least a few of the circuits talking about a more objective standard within kind of the four corners of the video.

Also, the Third Circuit said similar back in 2021 -- no, actually, December of last year.

So I think it's a hard question, long story short. But I think recent decisions from other circuits have put it as a more objective test, not subjective from the person who's producing or creating.

And moreover, Your Honor, as was argued previously, the statute doesn't require the producer to view it. I mean, that was an argument made to the jury in closing. And so whether or not the viewer needs to even view the thing in the first play, if that's true, then their subjective belief about what is lascivious or what counts as lascivious doesn't seem to carry a significant amount of weight versus the objective image on the screen itself.

THE COURT: Mr. Cervantes, what do you say?

MR. CERVANTES: I say that the issue that defense counsel is raising in citing to *Hillie* is not -- first of all, not binding Fourth Circuit precedent. I do agree that *Hillie* would suggest that you need to look at the viewer. But

there's also other decisions talking about the objective characteristics of the video and also the conduct that the defendant did with the video, including to look at it.

I think that the most appropriate instruction here would be to instruct them along the lines of what the Court said in the first part, which is to consider all of the evidence and then apply those -- the evidence to the factors listed on page, I have it as 13 of my version, but the page with the *Dost* factors. That would be the most appropriate thing, I think.

MR. AMES: Your Honor, there's another one, *United States versus Heinrich*, 21 -- *Heinrich*, H-e-i-n-r-i-c-h, number 21-2723. That's the Third Circuit. That's from this year. That was a case where defendant had a conviction and wanted to introduce a report -- a psychological type report to show that his production was supposed to be something showing beauty, or whatever, and wanted to introduce it. And the Court said no, you can't because, and I quote, the report is inadmissible because under the statute his reason for taking the pictures is irrelevant. It punishes those who orchestrate objectively sexually explicit conduct involving a minor in order to take pictures of the conduct.

So in other words, what he wanted it to be or what his intention was in that case, again, it's an objective standard of what was it. Was there a sexual act or explicit

act or not, period?

The *Hillie* case, in fact, if I remember right in the factual basis, I think it involves a shower as well. Almost -- and very similar, and a person cleaning themselves and doing regular bathroom things, if I'm recalling correctly. So factually, it's also very, very similar.

MR. CERVANTES: Your Honor, if I may actually cite some Fourth Circuit precedent.

I would direct the Court's attention to *US v. Courtade*, 929 F.3d 186. It's from 2019. Also involving a surreptitious recording in the bathroom shower. In *Courtade* the video did not depict the minor engaging in sexual conduct or activity connoting a sex act. Yet the Fourth Circuit concluded the video was lascivious because, quote, "far from depicting merely a girl showering, drying off, and getting dressed, the video contained extensive nudity -- including shots of her breasts and genitals -- that was entirely the product of an adult man's deceit, manipulation, and direction."

And so in that case the Court upheld the application of the *Dost* factors and a shower video just like this was found to be lascivious merely because of the defendant's actions.

And so I don't think it's fair to just say the viewer in the objective sense. I do think that the *Dost*

factors consider and look into what it is that the defendant did to obtain this video. And in this decision the Court looked at the defendant's conduct. So I do think it has an element of what the defendant thinks and is doing.

MR. AMES: Your Honor, just briefly.

In the *Courtade* case the victim is a young girl who the defendant plies with ice cream and tells her that the camera is off and goes and puts his hands into a shower and takes very affirmative acts to further the use or coercion, or whatever the theory is, I don't know for sure, but I would imagine more than just use. We're talking about someone that is actually taking active steps to put a camera in his hand, tell her certain things about it.

THE COURT: I don't think those factual distinctions inform the issue particularly. The two things I'm trying to weigh here is obviously it would never be enough if it's purely subjective because then a defendant could subjectively find something to be -- find something that would elicit a sexual response that wouldn't, by any measure, be lascivious. They can be attracted to elbows and that wouldn't make it lascivious even if they were -- even if that elicited a sexual response from them.

But on the other hand, the -- I think that there's some element to -- and I'm not sure the right word is intention as you quoted the Fourth Circuit case. It seems to

me that we can craft an instruction based upon some of what you just read to further explain sub-portion 6 to say among the things the jury can consider are, and then list the things the Fourth Circuit said were reasonable considerations in the determination of lasciviousness.

MR. CERVANTES: It was extensive nudity, including shots -- so extensive nudity and the product of the adult man's deceit, manipulation, and direction.

MR. AMES: Your Honor, I just -- can I please point out in the -- literally in the decision it's distinguishing from a case -- this is quoting from this Fourth Circuit case. "Here, the video's objective characteristics -- the images and audio contained within its four corners, irrespective of Courtade's private subjective intentions -- reveal the video's purpose of exciting lust or arousing sexual desire."

The next paragraph: "Far from depicting merely a girl showering, drying off, and getting dressed, the video contains extensive nudity -- including shots of the breasts," and so on.

The point being, Your Honor, it's making its ruling and decision distinguishing it from a case that would be barely similar to David Tatum's case and the video at play here.

THE COURT: I'm not sure that distinction is as broad or extensive as you're suggesting.

Mr. Whelan, do you have that case pulled up?

MR. WHELAN: Yes.

THE COURT: Can you just email it to me.

MR. WHELAN: Yes.

MR. ODULIO: Your Honor, if I may on *Courtade*?

THE COURT: Yes.

MR. ODULIO: I think the point counsel is making is actually reinforcing the government's view, which is the Fourth Circuit has said that in considering this issue, the Court can look beyond just the mere four corners of the image. You look at the actions and the intent of the person producing the video.

So I think the Court is right factually. It's actually of no moment. What's of moment is the Fourth Circuit saying, hey, you ought to look at that. And that, Your Honor, that reasoning, is at odds with and cannot be countenance with *Hillie*. That's why *Hillie* is not the law of the Fourth Circuit and is wrongly decided in the department's perspective and is not controlling here.

THE COURT: I think the Fourth Circuit itself -- I'm not real clear on this -- is perhaps not taking a directly contrary position to *Hillie*, but I think they've been critical of *Hillie*, if my memory serves on this issue.

MR. AMES: I'm not positive either, Your Honor. I --

THE COURT: Hold on just a second, everybody. Let me read the case and then we can discuss it further.

(Court peruses document.)

THE COURT: Well, the circuit -- I remember this case now from prior cases. Of course, the circuit described the problem of trying to decide whether subjective intent comes into play and says we don't have to in this case, so this can be done on an objective basis. So it doesn't express an opinion on whether there is any subjective element to this part of the analysis.

It does seem like when they go on to describe the things that make it objectively reasonable, some of them sound kind of objective to me, frankly. The producer was actively engaged in positioning and directing and filming, which sounds to me kind of subjective rather than objective, but that's not how the Court of Appeals saw it.

They do have some helpful language in here when they're concluding that the video there was objectively lascivious and says simply "because the images and audio -- revealing deceit, manipulation, and the careful directing and filming of a young girl resulting in footage of her breasts and genitals -- makes clear that the video's purpose was to excite lust or arouse sexual desire in the viewer." Which, again, sounds to me like it has an element of subjectivity in there. The circuit said, no, not so, but that's just how it

strikes me.

So I think to best be faithful to the Fourth Circuit on this, I'm going to have to craft some manner of incorporation of the language I just read into this answer to the jury's question and make it descriptive of what is being discussed in point 6 that we've all been talking about, the things the jury can consider. Thoughts?

MR. CERVANTES: We agree, Your Honor.

MR. AMES: I want to make sure that I understand, Your Honor. The instruction would involve descriptions from -- of certain behavior?

THE COURT: No, I'm going to have to -- and I'm not going to do this sitting in front of you, and I hate to delay the jury any further. I'm going to go out and try -- and I'll come back, of course, and bounce it off of everybody. But I want to describe for the jury some of what the Fourth Circuit has told us in answer to their question. I think that you're right, it's not as -- the answer that I crafted before would not be of particular help to the jury, I don't think. And perhaps not even accurately describes the state of the law.

MR. CERVANTES: Well, Your Honor, on that point, the first part of what you described in considering all of the evidence, I took it to mean what the Fourth Circuit was saying in this opinion, which is consider all of the factors, all of the things that happened to make the video to begin with and

not just look at the video itself, which is what the Court in *Courtade* is saying. That they not only look at the video, but they look at what the defendant did to make the video, the angle, selecting the angle.

So in that paragraph that the Court read where it starts "on its face, then, the video depicts," and it goes on to cite *United States versus Ward* and they quote specifically, "When a photographer selects and positions his subjects, it is quite a different matter from the peeking of a voyeur upon an unaware subject pursuing activities unrelated to sex." And here we have that. And I think what the Fourth Circuit is saying is, we can -- without getting into the mind, because they didn't decide that issue here, we can at least dispose of the issue by looking at the conduct that led to the creation of the video, which we argued the angle of the camera being on the floor.

MR. AMES: But the description he just gave is backwards. They were, again -- they were -- the position was the *Ward* case is -- if you read it again, he's talking about this is -- this *Ward* case is different than a situation where it's literally just a peeping Tom type of situation where there's not a person actively directing, manipulating, having someone move anywhere in particular, which is what this case is. It's literally no contact whatsoever. It's just sitting on a shelf.

And I'll note, Your Honor --

THE COURT: Well, wait a minute. There's certainly deception involved in hiding, so that's a common element in these.

MR. AMES: Yes, which --

THE COURT: There's also a question of positioning given where the camera was hidden. So this is not as distinct as you suggest.

All right. I think I've heard all the argument I need to. I'm going to try to craft something here. Tell you what it is. Perhaps hear some additional brief discussion about it. And then we're going to give the jury the Court's best opinion. I'll be back with you as soon as I can.

MR. CERVANTES: Thank you, Your Honor.

(Brief recess at 2:18 PM.)

(Court back in session at 2:38 PM.)

(Jury not present.)

THE COURT: All right. So during the break we've also looked at what's essentially a circuit split on this. Some say that point number 6 contains subjective elements, some say it does not. The Fourth Circuit says, yes, there's a disagreement among the circuits and we're not going to take a position yet.

So in working through this, I think the Court is going to have to take a position from among the circuits

because otherwise I'm not fairly answering the jury's question. I tried to structure some language that might give them some guidance without really answering their question, but that doesn't strike the Court as being fair to the jury.

So the Court's proposed instruction to be sent back is: "It is for the jury to determine whether an image or a video is lascivious as the Court has defined it for you. In considering this question, the jury may consider all of the evidence and draw reasonable inferences from the evidence. Among the circumstances the jury may consider are the selection and positioning of the subject; whether the video contains extensive nudity, including video of her breasts and genitals; and the entirety of the context in which the video was made, including the defendant's motivation and intent."

I'm siding with the circuits that have said that there's an element of that in it. I understand you object, Mr. Ames.

MR. AMES: Yes, Your Honor. And in particular because I think some of the language just mirrors some of the factors that are already present. For instance, the amount of nudity. Nudity is already a factor. The --

THE COURT: I understand the argument. But I'm reading Chief Judge Gregory's opinion where he said that one of the reasons that the video in that case was objectively lascivious was because of those kind of facts. And I'm trying

to track the circuit to the extent the circuit is giving me any guidance. I understand your argument that it's redundant, repetitive, and unnecessary. Is that the argument?

MR. AMES: Your Honor, the language it's tracking, is it from -- which case is it? Is it the *Courtade*, or whatever it is called?

THE COURT: Yes.

MR. AMES: So if you don't mind, Your Honor, can you read the instruction again.

THE COURT: Sure. "It is for the jury to determine whether an image or video is lascivious as the Court has defined it for you. In considering this question, the jury may consider all of the evidence and draw reasonable inferences from the evidence. Among the circumstances the jury may consider are the selection and positioning of the subject; whether the video contains extensive nudity, including video of her breasts and genitals; and the entirety of the context in which the video was made, including the defendant's motivation and intent."

The first two-thirds of that sentence are essentially paraphrases or near quotations from the *Courtade* case.

Emmett, can you hand that up to me so I can sign it.

MR. AMES: Sorry, I apologize. I'm looking for the language.

THE COURT: No, I understand. Look, that's the instruction I'm going to give. I know that you object to it and I'm confident in the event of a conviction you'll appeal it and perhaps this time the circuit will answer the question for us. But that's my best judgment of what the law should be and what my best guess the Fourth Circuit and/or the Supreme Court will find it to be.

MR. AMES: So I --

THE COURT: That's it. Discussion over. I mean, I hear your objection. I understand your objection. And I'm taking my best shot at giving them what I believe is the correct statement of the law.

(The Court's response was tendered to the jury.)

MR. AMES: Would you mind -- would you mind reading the question for me one more time so I can just jot it down, Your Honor?

THE COURT: Sure. I'll let you come up and just copy it verbatim.

MR. AMES: That would be perfect. Thank you.

THE COURT: Sure. Both sides, of course, are invited.

We'll wait for Ms. Kirk to get back to do that. And we can make additional copies.

Emmett, if you would print what went back to the jury.

We'll be in recess pending further word from the jury.

(Recess pending a verdict at 2:45 PM.)

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(Court back in session at 3:02 PM.)

THE COURT: All right. I'm told we have a verdict. Please bring in the jury.

(Jury entered the courtroom.)

THE COURT: Has the jury reached a verdict?

JUROR NO. 12: Yes, Your Honor.

THE COURT: And are you the foreperson?

JUROR NO. 12: Yes, Your Honor.

THE COURT: If you would please hand the verdict form to Ms. Kirk.

(Verdict form tendered to the Court.)

THE COURT: In the matter of the United States versus David Tatum, we, the jury, find:

As to count one, the defendant guilty.

As to count two, the defendant guilty.

As to count three, the defendant guilty.

Is this your verdict, so say you all?

(Affirmative response.)

THE COURT: Do you wish to poll -- the jury to be polled, Mr. Ames?

MR. AMES: Yes, Your Honor.

THE CLERK: Ladies and gentlemen of the jury, in the case of the United States of America versus David Tatum, you have returned a verdict of guilty as to the three counts in the superseding indictment.

Junior number 1, was this your verdict and is this still your verdict?

JUROR NO. 1: Yes.

THE CLERK: Juror number 2, was this your verdict and is this still your verdict?

JUROR NO. 2: Yes.

THE CLERK: Juror number 3, was this your verdict and is this still your verdict?

JUROR NO. 3: Yes.

THE CLERK: Juror number 4, was this your verdict and is this still your verdict?

JUROR NO. 4: Yes.

THE CLERK: Juror number 5, was this your verdict and is this still your verdict?

JUROR NO. 5: Yes.

THE CLERK: Juror number 6, was this your verdict and is this still your verdict?

JUROR NO. 6: Yes.

THE CLERK: Juror number 8, was this your verdict and is this still your verdict?

JUROR NO. 8: Yes.

THE CLERK: Juror number 9, was this your verdict and is this still your verdict?

JUROR NO. 9: Yes.

THE CLERK: Juror number 10, was this your verdict and is this still your verdict?

JUROR NO. 10: Yes.

THE CLERK: Juror number 12, was this your verdict and is this still your verdict?

JUROR NO. 12: Yes.

THE CLERK: Juror number 13, was this your verdict and is this still your verdict?

JUROR NO. 13: Yes.

THE CLERK: Juror number 14, was this your verdict and is this still your verdict?

JUROR NO. 14: Yes.

THE COURT: All right. Members of the jury, I think I said this during jury selection, that I'm always impressed with every juror and how seriously you take your duty, and it's particularly true in this case in some ways. You ought to be lawyers. I hate to criticize you like that, but you ought to be lawyers in some ways. The question you asked and the reason it took some time to give you an answer is because when you were asking about lasciviousness and essentially whether that's a totally objective standard or is there a subjective element to it, well, we have 12 circuit courts of

appeal in this country. Some of them say it's all objective. Some of them say, no, there's a subjective element to that. We sit in the Fourth Circuit Court of Appeals and they have said, yes, there's a circuit split and we're not saying yet which side we're on. Of course, I'm bound by Fourth Circuit precedent.

So having read the cases, I was more persuaded by those courts that think that there is a subjective component to that point that you were asking about; that it's not purely objective. But I expect we'll get an answer from the Court of Appeals at some point on that.

But I say that just, again, to thank you and congratulate you for how seriously you took this. Obviously, you dove into the case and gave it significant thought.

If any of you would like to remain in the jury room, I'd be glad to come meet with you and talk about federal procedure, the rules of evidence, anything that you're kind of curious about. It is not a command performance. You have done your duty.

And you will not be instructed as to what to do after this. You may talk to whomever you want or you can refuse to talk with whomever you want. But I very much thank you, as I'm sure all the participants in this trial do, for your seriousness and your consideration.

But if you do want to stay, just stay in the jury

room. Let Ms. Kirk know that you want to meet with me. I have a few minutes worth of things I have to do. Then I'll come find you, if you want to. You are free to leave. But do leave your badges and your notepads behind. Thank you very much.

(Jury exited the courtroom.)

THE COURT: Now, as to the forfeiture count, since that's been left to the Court, let me ask whether the parties would be amenable to the two of you getting together and see if there's a consensus with respect to that. You might be able to come up with a proposed joint order. If need be, if we need a hearing, let me know that as well and we'll schedule one since we're not under a particular gun for that.

Now, with respect to Mr. Tatum's release status, what is the government's position?

MR. ODULIO: Your Honor, our position is that under 3143, by operation of law, he ought to be detained.

THE COURT: Mr. Ames, I'll be glad to hear from you, but let me preface it by saying Section 3143(a)(2) tells this Court that the defendant shall be detained, except under a couple of exceptions that don't apply here, because under 3142(f)(1)(A) this is considered a crime of violence pursuant to 3156(a)(4)(C) and the word "shall" does not seem to give the Court any discretion in this matter.

So, Mr. Tatum, you will be confined pending

sentencing. The U.S. Probation Office is going to prepare a presentence report. It is a pretty lengthy document from which the Court gets to know more about you, more about the circumstances of this case perhaps. And that takes about 60 to sometimes 90 days. And then the Court schedules sentencings just as soon as they're ready and the Court's schedule allows, so we'll try to keep this thing moving forward.

Yes, Mr. Ames.

MR. AMES: Nothing, Your Honor. I appreciate it.

THE COURT: All right. Mr. Tatum is in the custody of the marshals.

All right. The Court is in recess until next Wednesday at 9:30.

(End of proceedings at 3:11 PM.)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CERTIFICATE OF REPORTER

I, Cheryl A. Nuccio, Federal Official Realtime Court Reporter, in and for the United States District Court for the Western District of North Carolina, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 13th day of September 2023.

s/Cheryl A. Nuccio
Cheryl A. Nuccio, RMR-CRR
Official Court Reporter